

# The Bay Institute *of San Francisco*

December 15, 1997

Robert Perciasepe, Assistant Administrator for Water  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, D.C. 20460

RE: BAY-DELTA ACCORD EXTENSION

Dear Mr. Perciasepe,

Today marks the expiration of the 1994 Bay-Delta Accord. It is our understanding that the federal and state governments have agreed to a one-year extension of the Accord. As a signatory to the Accord, we continue to be extremely concerned that the federal and state governments have failed to correctly implement provisions of the Accord, particularly with regard to the exercise of no net loss and operational flexibility. Most recently, water quality standards for Delta outflow - adopted by the State Water Resources Control Board and approved by the U.S. Environmental Protection Agency (US EPA) in 1995 - were deliberately relaxed in November 1997 under the no net loss provision, in order to help offset water supply impacts of implementing Central Valley Project Improvement Act (CVPIA) fish doubling measures earlier in the year.

The Accord is clear in stating that the no net loss provision applies only to compliance with the take provisions of the federal Endangered Species Act (ESA) (Accord, p. 3, ESA flexibility, section 1), to additional listings under the federal ESA (p. 5, section 2.b), and to the execution of voluntary actions recommended by the CALFED Operations Group (Attachment A). The Accord does not apply the no net loss provision to any other existing regulatory or statutory obligations. Furthermore, the exercise of operational flexibility to achieve no net loss under the ESA flexibility provisions of the Accord (p. 3, ESA flexibility, section 1) applies only to adjustment of export limits, and may not be applied to other operational constraints, including water quality standards. Operations to exercise flexibility and achieve no net loss that involve relaxation of constraints other than export limits are not authorized by the Accord.

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The recent relaxations of Delta outflow standards are neither consistent with the Accord nor US EPA's approval of the 1995 Bay-Delta Water Quality Control Plan (WQCP). Extension of the Accord by the federal and state governments without clarification and correction of this problem is not justified. We therefore request clarification from US EPA regarding its position on relaxation of water quality standards and the use of operational flexibility under the Accord and the 1995 WQCP.

Sincerely,



Gary Bobker  
Senior Policy Analyst

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*of San Francisco*

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FAX COVER SHEET

DATE: 12/15

TO: BOB PERCIASEPE

cc: PHIL METZGER

TOM HAGLER

PATRICK WRIGHT

Phone # \_\_\_\_\_

Fax # \_\_\_\_\_

FROM: GARY BOBKER

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Comments: NOTE NEW STREET ADDRESS - ALL

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Dear Mr. Bobker:

Thank you for your letter of August 27, 1997 regarding issues related to the extension of the Bay-Delta Accord. As you may know, CALFED is preparing a response to come jointly from the ClubFED agencies and California. However, that letter has not been finalized, and you have requested in a new letter of December 16, 1997 that I respond to key EPA issues.

As you know, EPA has been particularly interested in implementation of Bay-Delta water quality standards consistent with the Accord. Water quality standards developed and applied pursuant to the Accord must also meet the requirements of the Clean Water Act (CWA). Because allocation of water quantity is a matter of State authority, States may choose to implement certain flow-related water quality standards (such as salinity) through flow measures and/or flow standards.

Whatever means a State chooses to frame or implement a water quality standard, it remains accountable under the CWA for achieving such standards. If at any given time such standards are not achieved, compliance efforts must follow CWA substantive requirements and procedures. Compliance alternatives may include temporary variances from or revisions of a water quality standard, if carried out in compliance with CWA requirements. All this applies equally where a State frames a water quality standard as a water quality-related flow standard. If it did not, the CWA would be fundamentally undermined, as a State would be exempted from the CWA obligation to meet water quality standards simply because the State had framed such CWA-required standards as flow standards. Such an exemption would be contrary to the view of Senator Wallop, author of CWA §101(g), that "[l]egitimate water quality measures authorized by this act.... may incidentally affect individual water rights"; that is, water rights may be affected as a necessary incident of pursuing water quality goals, such as Bay-Delta standards.

The Accord as written does not change or imply a change in these fundamental CWA requirements; rather, it explicitly recognizes them as operating limitations. As stated in the press release agreed to by California and the ClubFED agencies to accompany the Accord extension, "The agreement [that is, the Accord] specifies that compliance with the 'take' provisions of the Federal Endangered Species Act is not intended to result in any additional loss of water supply. To meet that goal, the Accord allows for operational flexibility, developed through a state and federal operations group, within the constraints of the water quality standards...."

The press release and the Accord use essentially identical language to state that the water quality standards are to operate as a constraint on Operations Group flexibility. Water quality standards cannot simultaneously *constrain* Operations Group flexibility and be a measure available to the Operations Group under the Accord to *provide* flexibility. The only logical conclusion is that the Accord (equally as restated in the press release) is consistent with the CWA, and thus precludes relaxation of water quality standards as a flexibility measure except in compliance with CWA requirements (or as the Accord states it, "within the limits of the water quality ... requirements"). The Operations Group's actions in the 1997 water year are not to the contrary, as they provided an equivalent level of protection as the standards under the specific conditions and manner in which they were carried out.

More broadly, the recent water management problems and related controversies regarding water quality and quantity are further evidence of the need for a comprehensive solution to California's water issues. All agencies and stakeholders need to continue their efforts on the CALFED Bay-Delta Program, the long term implementation decisions under the Central Valley Project Improvement Act, and the State Board's water rights decision, so that these programs can begin to move toward a productive and sustainable balancing of the many interests in California water.

Sincerely,

Robert Perciasepe  
Assistant Administrator